SUPREME COURT, U.S.
FILED
SEP 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-58

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES FULTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because the government allegedly violated the Jencks Act, 18 U.S.C. 3500.

2. Whether petitioner's counsel had a conflict of interest that impaired his representation of petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	7
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	7
Killian v. *United States*, 368 U.S. 231 (1961)	6
United States v. *Angelini*, 607 F.2d 1305 (9th Cir. 1979)	6
United States v. *Bastanipour*, 697 F.2d 170 (7th Cir. 1982), cert. denied, 460 U.S. 1091 (1983)	6
United States v. *Cole*, 634 F.2d 866 (5th Cir.), cert. denied, 452 U.S. 918 (1981)	6
United States v. *Gotchis*, 803 F.2d 74 (2d Cir. 1986)	6
United States v. *Harris*, 543 F.2d 1247 (9th Cir. 1976)	6
United States v. *Harrison*, 524 F.2d 421 (D.C. Cir. 1975)	6
United States v. *Hinton*, 719 F.2d 711 (4th Cir. 1983), cert. denied, 465 U.S. 1032 (1984)	6
United States v. *Lyman*, 592 F.2d 496 (9th Cir. 1978), cert. denied, 442 U.S. 931 (1979)	6
United States v. *McKenzie*, 768 F.2d 602 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986)	6
United States v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976)	6
United States v. *Peterson*, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976)	6
United States v. *Petito*, 671 F.2d 68 (2d Cir.), cert. denied, 459 U.S. 824 (1982)	6
United States v. *Sanchez*, 635 F.2d 47 (2d Cir. 1980)	6
United States v. *Spatuzza*, 331 F.2d 214 (7th Cir.), cert. denied, 379 U.S. 829 (1964)	6

Cases – Continued: Page

United States v. *Washington*, 504 F.2d 346 (8th Cir. 1974) 6
Wood v. *Georgia*, 450 U.S. 261 (1980) 7

Statutes:

Jencks Act, 18 U.S.C. 3500 ..... 4, 5
18 U.S.C. 3500(d) 5
21 U.S.C. 841(a) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 844 2
21 U.S.C. 846 2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-58

CHARLES FULTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. On June 3, 1988, Justice Marshall extended the time for filing a petition for a writ of certiorari to July 11, 1988, and the petition was filed on July 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to possess more than

one kilogram of heroin with intent to distribute it (21 U.S.C. 841(a) and 846), five counts of possessing heroin with intent to distribute it (21 U.S.C. 841(a)(1)), one count of attempting to possess more than one kilogram of heroin with intent to distribute it (21 U.S.C. 846), and one count of possessing cocaine (21 U.S.C. 844). Petitioner was sentenced to concurrent 20-year terms of imprisonment on the conspiracy and heroin possession counts, as well as a concurrent two-year term of imprisonment on the cocaine count. Petitioner was also fined $710,000. Pet. App. 2a-3a.

1. The evidence at trial showed that petitioner was involved over a two-year period in five large heroin transactions (Tr. 41-81, 219-260). During part of that period, between June 1985 and February 1986, petitioner received a total of 18 kilograms of heroin. Petitioner was arrested on April 13, 1987, when agents of the Drug Enforcement Administration accompanied petitioner's supplier to an apartment where petitioner and his accomplice hoped to buy five kilograms of heroin. After arresting petitioner, the agents found two and one-half kilograms of heroin hidden in the apartment. *Id.* at 229-234, 243-260.

2. Before trial, petitioner was arraigned on an eight-count superseding indictment. At that time, the prosecutor brought to the district court's attention the fact that petitioner's personal calendar, which was seized at the time of his arrest, contained a notation of a loan from petitioner to the son of petitioner's counsel (C.A. App. 13a). The prosecutor told the court that she would agree to redact that notation in the event that the calendar was introduced into evidence (*ibid.*).[1] The prosecutor said: "I think it is

[1] At trial, the district court admitted into evidence only three pages of petitioner's calendar; those pages did not include the reference to counsel's son (Tr. 251).

advisable that we notify the Court of this redaction, and that the defendant be advised * * * about his right to be represented by an attorney without conflict of interest" (*ibid.*). Petitioner's counsel then explained that petitioner gave counsel's son the money to buy audio equipment for petitioner at an auction. Petitioner's counsel stated: "My son felt very ill at ease with it and turned it – never used it, and turned it back" (*id.* at 14a).

Petitioner then addressed the court and stated (C.A. App. 14a):

> I verify that that is what happened and * * * I do find some things in conflict of interest and * * * I am dismissing Mr. Port as my attorney and will seek other counsel.

The court then asked petitioner: "What is this conflict of interest?" (*ibid.*). Petitioner responded: "The conflict of interest of what the item that [the prosecutor] just spoke of" (*ibid.*). The court then asked: "How does that give rise to a conflict of interest?" (*ibid.*). Petitioner responded that his lawyer's description of the "loan" was accurate, but petitioner added: "I feel that there has been swaying or a swaying of [my attorney's] decisions to consult me and therefore, I feel that the issue developed a conflict of interest between my attorney and myself" (*id.* at 15a). The prosecutor and petitioner's counsel then told the court that they did not see any conflict of interest. The district court agreed and stated: "I don't see any conflict of interest at all" (*id.* at 16a). When the trial commenced five days later, petitioner's counsel told the district court that "[t]he defendant has not changed his views" but that "he has not hired anyone else * * * " (Tr. 2).

3. At trial, Ashok Malik testified about petitioner's role in four large heroin transactions. On cross-examination, Malik, who testified under a cooperation agreement

with the government, discussed his meetings with DEA agents. He stated that "there were quite a few debriefing meetings" from October 1986 through June 1987 (Tr. 91, 156). In preparing for those meetings, Malik made "some notes in the bullpen before coming to see [the agents] * * * so that [he] could collect and get the time of these [drug] transactions" (Tr. 120). The government gave petitioner's counsel a photocopy of Malik's notes (Pet. App. 7a).

Special Agent Lori Butler was one of the DEA agents who interviewed Malik (Tr. 412). Butler met with Malik at least ten times before she left on maternity leave in March 1987. Agent Butler took notes during her meetings with Malik (Tr. 417), but she was unable to locate those notes when she returned to work after her leave (Tr. 417-418).[2] Petitioner's counsel questioned Butler at length about the misplaced notes (*id.* at 418-422). And counsel emphasized the lost notes in his argument to the jury in an attempt to cast doubt on the government's case (*id.* at 417-418). Petitioner's counsel, however, did not move to strike Malik's or Butler's testimony, nor did he move for a mistrial based on the government's failure to produce the notes at trial.

4. The court of appeals affirmed petitioner's convictions (Pet. App. 1a-9a). The court rejected petitioner's argument, first raised in the court of appeals, that the government failed to produce statements of witnesses as required by the Jencks Act, 18 U.S.C. 3500. The court observed that petitioner was given a copy of Malik's notes and that the government was not required to produce the originals (Pet. App. 7a). The court further held that the government was not required under the Jencks Act to preserve and turn over the rough notes made by Agent Butler (*ibid.*).

---

[2] Another DEA agent had used Butler's notes to prepare a formal report on Malik's interviews (Tr. 415, 418-419). The government gave petitioner's counsel a copy of that report before trial.

The court of appeals also ruled that petitioner failed to show that an actual conflict of interest affected his lawyer's performance (Pet. App. 6a). And the court observed that "the redaction of the calendar to remove the name of counsel's son as a person to whom [petitioner] had loaned money removed any appearance of conflict" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 15-16) that the government violated the Jencks Act by giving petitioner's counsel photocopies of Malik's notes rather than the original notes. As the court of appeals pointed out (Pet. App. 7a), however, petitioner's counsel did not request the original notes at trial. Moreover, nothing in the Jencks Act requires the government to produce original documents containing witness statements rather than accurate and clear photocopies.

Petitioner further asserts (Pet. 18) that the "government's failure to preserve the handwritten notes of agent Butler * * * is a violation of the Jencks Act." Petitioner, however, did not preserve that claim for appeal. The Jencks Act provides that after a witness has testified on direct examination, the court shall, on motion of the defendant, order the government to produce any statement of the witness in its possession that relates to the subject matter of the witness's testimony (18 U.S.C. 3500(b)). If the government does not comply with the court's order, the court "shall strike from the record the testimony of the witness" and, if necessary, declare a mistrial (18 U.S.C. 3500(d)). In this case, petitioner's counsel did not move for the production of Agent Butler's notes. Instead, counsel called the jury's attention to the loss of Butler's notes and sought to make "the most of the loss" of the notes "as casting doubt on the Government's case." *United States* v.

Miranda, 526 F.2d 1319, 1328 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976). Petitioner's counsel did not seek a mistrial nor did he ask the court to strike any witness's testimony. Accordingly, petitioner waived any claim that the government violated the Jencks Act by failing to produce Agent Butler's notes. See *United States* v. *McKenzie,* 768 F.2d 602, 607-608 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *United States* v. *Petito,* 671 F.2d 68, 73-74 (2d Cir.), cert. denied, 459 U.S. 824 (1982), *United States* v. *Lyman,* 592 F.2d 496, 499 (9th Cir. 1978), cert. denied, 442 U.S. 931 (1979); *United States* v. *Peterson,* 524 F.2d 167, 175 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); *United States* v. *Washington,* 504 F.2d 346, 349 (8th Cir. 1974); *United States* v. *Spatuzza,* 331 F.2d 214, 218 (7th Cir.), cert. denied, 379 U.S. 829 (1964).[3]

---

[3] There is authority for the proposition that agents must preserve their original notes of interviews with witnesses. See *United States* v. *Harris,* 543 F.2d 1247, 1253 (9th Cir. 1976); *United States* v. *Harrison,* 524 F.2d 421, 434-435 (D.C. Cir. 1975). The prevailing view, however, is that the Jencks Act does not require the production of an agent's rough notes of interviews once those notes have been "reduce[d] to formal reports" (*United States* v. *Gotchis,* 803 F.2d 74, 78 (2d Cir. 1986)). See *United States* v. *Hinton,* 719 F.2d 711 (4th Cir. 1983), cert. denied, 465 U.S. 1032 (1984); *United States* v. *Bastanipour,* 697 F.2d 170, 174 (7th Cir. 1982), cert. denied, 460 U.S. 1091 (1983); *United States* v. *Sanchez,* 635 F.2d 47, 66 n.20 (2d Cir. 1980); *United States* v. *Cole,* 634 F.2d 866, 868 (5th Cir.), cert. denied, 452 U.S. 918 (1981); see generally *Killian* v. *United States,* 368 U.S. 231, 241-242 (1961). Moreover, even the Ninth Circuit, which holds rough notes subject to production under the Jencks Act, has held that the Jencks Act is not violated when the notes are lost, as in this case, rather than destroyed as a matter of agency policy. See *United States* v. *Angelini,* 607 F.2d 1305, 1308 (9th Cir. 1979). Accordingly, even the courts that regard rough notes as being subject to the Jencks Act would not necessarily have found a violation in this case, even if the issue had been preserved. In any event, as we have noted, any conflict among the circuits on that issue is not presented in this case because petitioner waived any Jencks Act claim concerning Agent Butler's rough notes.

2. Petitioner next maintains (Pet. 18-29) that the district court did not conduct a sufficient inquiry into whether petitioner's counsel labored under a conflict of interest. It is settled that "the possibility of conflict is insufficient to impugn a criminal conviction. * * * [A] defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). Petitioner does not contend that the record shows such an actual adverse effect from a conflict. Instead, petitioner claims that his lawyer might have been influenced by a conflict of interest and thus the district court should have conducted an inquiry into the matter.

The record does not support petitioner's claim. The record shows that petitioner gave his counsel's son some money to buy audio equipment for petitioner. Counsel's son returned the money to petitioner without making any purchases. Petitioner's relationship with counsel's son was not relevant to any matter at issue in the trial. And the connection between petitioner and counsel's son was not made known to the jury. Petitioner does not dispute any of those facts. Nor could he explain to the district judge (who made several inquiries) how those facts could possibly have given rise to a conflict of interest. The prosecutor and petitioner's lawyer did not perceive any conflict. Accordingly, the district court was justified in finding that petitioner's counsel did not have a conflict of interest that impaired his representation of petitioner.

Petitioner cites *Wood* v. *Georgia*, 450 U.S. 261 (1981), and *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), for the proposition that a court must conduct an inquiry when a possible conflict of interest is brought to the court's attention. Here, the district court conducted such an inquiry. The district court ascertained the facts regarding petitioner's relationship with his lawyer's son. The court gave

petitioner the opportunity to explain why he thought those facts gave rise to a conflict of interest. And the court asked both parties' counsel whether they perceived any conflict. On the basis of the court's inquiry, the court found that petitioner's counsel did not have an actual conflict of interest that would affect his performance. The court of appeals, which reviewed the entire record, agreed with that assessment. Petitioner is not now entitled to another hearing on that issue.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
ANDREW LEVCHUK
Attorney

SEPTEMBER 1988

[4] None of the court of appeals decisions cited by petitioner (Pet. 28-29) require a formal evidentiary hearing when, as here, the undisputed facts do not demonstrate any conflict of interest.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60645